

Internal Revenue Service

memorandum

CC:TL-N-7128-88

Br4:HGSalamy/CRGilbert

date: JUL 06 1988

to: District Counsel, Dallas CC:DAL  
Attn: S. Brower

from: Director, Tax Litigation Division CC:TL

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subject: Pre-90

This is in response to your June 10, 1988, request for technical advice.

ISSUE

Should the Service issue a notice of deficiency for [REDACTED] to the taxpayers or has the 90 days provided in the Form 872-A expired by actual receipt of the Form 872-T at the Examinations Division.

CONCLUSION

The administrative files for [REDACTED] were apparently lost in the mail last year. Some documentary evidence, such as the Form 872-T and the cover letter with envelope, exists but most of the facts have been orally recounted.

The Form 872-T was sent by certified mail on [REDACTED] 1987, to the proper district (Dallas) but neither the envelope, nor the cover letter nor the Form 872-T was marked to the attention of the Examinations Division as required. The Form 872-T specified the [REDACTED] year, included the date of the Form 872-A consent and was signed by both [REDACTED]. The issuing office code box on the Form 872-T was left blank and the wife's TIN was used rather than that of the husband. Only the front page of a Form 872-T was submitted as the form was copied from a forms book.

Approximately one week later, the Form 872-T was received in the Planning and Special Programs Branch of the Examinations Division. When no audit activity could be located under the stated TIN (because it was that of the wife), the Consents Coordinator in the branch telephoned the attorney to inquire. The Consents Coordinator was told that the taxpayers' records were a mess, that the attorney did not know for sure which years had been extended and that the Form 872-T was sent to the Service as a protection. Thereafter, the Consents Coordinator took no action until some eight months later on [REDACTED], when the Ninety Day Coordinator in the Quality Review Staff of

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the Examinations Division made contact with him to determine if a Form 872-T had been filed. The Quality Review Staff contact resulted from uncertainty over whether or not the Service had previously issued a deficiency notice; it had not, a deficiency notice was apparently prepared but never issued.

This is a close case but under the peculiar circumstances presented, we recommend that the Service consider the normal period of limitations as extended for [REDACTED] to have expired.

#### DISCUSSION

The taxpayers are part of the [REDACTED] limited partnership tax shelter project. The [REDACTED] year involves a deficiency of some \$ [REDACTED].

Your request cites the recent Burke v. Commissioner, T.C. Memo. 1988-325 for the proposition that "meticulous compliance" with all conditions of the waiver extension and termination must be complied with in order to restart the running of the period of limitations. In Burke, the Form 872-T was delivered, without an attention designation, to the District Director's Collection Teller Unit and eventually found its way to the Examinations Division which issued the deficiency notice within 90 days of the receipt of the Form 872-T at the Examinations Division. The Tax Court in validating the timeliness of the notice of deficiency agreed with the Service that the 90 days runs from the time the Form 872-T was received at the Examinations Division. Burke limited Freedman v. Commissioner, T.C. Memo. 1986-257 where the Form 872-T was properly marked and submitted to the Teller Unit, attention of Chief, Examinations Division, but was never received in that division.

Here, not only was the Form 872-T not marked to the attention of the Examinations Division but bore the TIN of the wife rather than that of the husband (without so signifying). The fact that no issuing office code was included is of no consequence in our view. Yet, once the Form 872-T actually arrived at the Examinations Division and once the Consents Coordinator spoke with taxpayers' attorney, it could be concluded that any defects in the Form 872-T were effectively waived (emphasis added). The purpose of the Form 872-T is to give "those persons...considering the taxpayer's return...sufficient time (90 days) to complete their consideration of it after receiving actual notice that the time for assessment is coming to an end." Burke v. Commissioner, supra. Since it is undisputed that the attorney informed the Consents Coordinator that [REDACTED] were terminating their [REDACTED] consent, actual notice could be found to have been given at that time.

Arguably, the "meticulous compliance" mandated by Burke has not been met here and the taxpayers and their attorney bear responsibility for the state of circumstances surrounding submission of the Form 872-T. The exact date when the Consents Coordinator spoke with the attorney is unavailable and the parties' recollection of what was stated will probably be in dispute. The Consents Coordinator informing the attorney that no active case could be found under the TIN and the attorney telling the Consents Coordinator he was not sure which years had been extended, could be considered a rational basis for the Consents Coordinator to do nothing further at that point. This reliance could form the basis for an estoppel argument against taxpayers. See, Piarulle v. Commissioner 80 T.C. 1035 (1983). At best, it might be argued that the Form 872-T is effective only as to the wife. Nonetheless, we are uneasy over how the Tax Court would regard the conversation between the attorney and the Consents Coordinator. We do not wish to risk precedent that a deficient Form 872-T can be cured by information furnished orally when the attorney is called by the Examinations Division.

Overall, we come away with the impression that the taxpayers bona fide intended to terminate the joint consent and that while the submitted Form 872-T itself was deficient, the Examinations Division should have been reasonably aware of that intent after contact with taxpayers' attorney was made. We have more to lose than to gain here. The integrity of the terms of the consent process are susceptible to being called into question. The instructions on the Form 872-T, which along with the Form 872-A make up the terms of the written agreement, specifically require only (as relevant here) the following which arguably have been met by the [REDACTED] Form 872-T:

- (1) the date the Form 872-A was signed for the Internal Revenue Service,
- (2) if the termination notice is for income tax for any year(s) for which a joint return was filed, both the husband and wife must sign, unless one acting as a power of attorney signs for the other. The signatures must match the names as they appear on the Form 872-A, and
- (3) if the return(s) to which this notice applies is under consideration by the Examinations Division, mail the notice to the district with jurisdiction, Attention: Chief, Examinations Division.

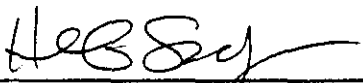
There is no instruction which states the husband and wife must include their TINs. The Burke opinion solidly supports the Service; we do not believe that the \$ [REDACTED] at issue warrants

the risk of the Tax Court's diluting the strict approach taken in Burke. A tightening of the termination process is currently under consideration by us, the Appeals Division and the Examinations Division, including modification of Form 872-A and Form 872-T.

Before you make the decision not to issue the notice of deficiency, you should coordinate with the [REDACTED] tax shelter project attorney. Also, we understand that there may be some question over whether the [REDACTED] year is subject to the TEFRA partnership provisions, making it possible for the Service to assert liability for [REDACTED] despite expiration of the period of limitations for the taxpayers [REDACTED] tax year individually. If you have any questions, please call Craig Gilbert at FTS 566-3305.

MARLENE GROSS  
Director

By:

  
HENRY G. SALAMY  
Chief, Branch No. 4  
Tax Litigation Division